

SHER TREMONTE LLP

August 12, 2022

BY ECF

The Honorable George B. Daniels
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

The Honorable Sarah Netburn
United States Magistrate Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *In re Terrorist Attacks on September 11, 2001*, Case No. 03-md-1570
(GBD)(SN)

Dear Judge Daniels and Judge Netburn:

We write on behalf of our clients, the *Ashton* Plaintiffs, to advise the Court of supplemental authority relevant to the turnover motions of the *Havlish* and *Doe* Plaintiffs, which the *Federal Insurance* Plaintiffs joined, and the *Smith* Plaintiffs (the “MDL Turnover Motions”). ECF Nos. 7763-71 (*Havlish*. and *Doe* motions), 7936-38 (*Federal Insurance* motion); *Smith v. The Islamic Emirate of Afghanistan*, 01-cv-10132 (S.D.N.Y.), ECF Nos. 62-5 (*Smith* motion).¹ Yesterday, the Second Circuit unsealed and posted on its public website a previously decided opinion, *Levinson v. Kuwait Finance House (Malaysia) Berhad*, No. 21-2043 (2d Cir. July 21, 2022). A copy of the redacted slip opinion is attached hereto as Exhibit A.

In *Levinson*, the plaintiffs obtained a default judgment under the Foreign Sovereign Immunities Act (FSIA) against the Islamic Republic of Iran. Under the Terrorism Risk Insurance Act (TRIA), which provides an exception to the FSIA, plaintiffs sought to satisfy that judgment using attachment or execution of “blocked assets” of Iran or any of Iran’s “agenc[ies] or instrumentalit[ies].” TRIA § 201(a). Specifically, the *Levinson* plaintiffs (i) moved the district court pursuant to New York’s CPLR for turnover of assets belonging to Kuwait Finance House (KFH) Malaysia on the basis that KFH was an “agency or instrumentality” of Iran for purposes of TRIA, and (ii) moved *ex parte* for a writ of execution on KFH’s assets. *Levinson*, slip op. at 3. The district court granted the writ of execution without first determining whether TRIA’s requirements had been met, including

¹ Subsequent to the May 18, 2022 filing of the *Smith* turnover motion, this Court accepted the *Smith* action as related in a June 10, 2022 order. ECF No. 8086.

whether KFH Malaysia was in fact an “agency or instrumentality” of Iran, and whether the assets were blocked. *Id.* at 5, 9.

The Second Circuit held that the district court’s grant of a writ of execution prior to making any findings about “KFH Malaysia’s connections to Iran” was “legal error.” *Id.* at 12. TRIA, the Circuit concluded, requires that prior to seizing assets through a writ of execution, “a plaintiff must first establish [a] defendant’s status as an agency or instrumentality.” *Id.* “Put another way, before ordering assets to be seized under TRIA, a district court must make findings as to whether TRIA indeed permits those assets to be seized.” *Id.* at 13 (citing *Levin v. Bank of N.Y.*, No. 09-CV-5900, 2011 WL 812032, at *13 (S.D.N.Y. Mar. 4, 2011)). Because “these procedures were not followed,” the district court should not have granted a writ of execution because there had “been no showing that KFH Malaysia is in possession of property ‘in which the judgment debtor [Iran] has an interest.’” *Id.* (quoting CPLR § 5225(b)).

Levinson’s relevance to the MDL Turnover Motions is plain. Each of the *Havlish*, *Doe*, *Federal Insurance*, and *Smith* Plaintiffs sought and obtained writs of execution against assets held in the name of Da Afghanistan Bank (DAB, the DAB Assets) at the Federal Reserve Bank of New York without a prior finding by this Court that TRIA’s requirements were satisfied.² Indeed, the prerequisites for the grant of a writ still have not been met as the MDL Turnover Motions specifically seek findings under TRIA§ 201(a) that DAB is an “agency or instrumentality” of the Taliban and that the assets are blocked. *See, e.g.*, ECF No. 7661, at 27 (“The question remaining for this Court is therefore whether the unlicensed DAB Assets are ‘blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party).’”); Apr. 26 Hr’g Tr. 4:21-5:1 (Daniels, *J.*: “In the turnover proceeding, we intend to resolve certain specific issues. . . . [O]ne, we’re going to first resolve whether or not these subject funds are available to satisfy judgments against the Taliban. That’s the first question to be resolved.”), attached hereto as Exhibit B.

Thus, under the Second Circuit’s newly released and binding precedent, each writ of execution against the DAB Assets is invalid. And because there is currently no valid writ of execution against the DAB Assets, there is no basis for any of the turnover movants to claim an entitlement to or priority over those Assets. Accordingly, the Court must deny the MDL Turnover Motions, even putting aside the other arguments the *Ashton* Plaintiffs

² The *Havlish* and *Doe* Plaintiffs obtained their writs of execution on August 27, 2021, and September 27, 2021, respectively, long before President Biden’s Executive Order 14064 blocked the DAB Assets on February 11, 2022.

set forth in their Memorandum of Law in Opposition to the *Havlish* and *Doe* Creditors' Motions for Partial Turnover. ECF No. 7894.³

Respectfully submitted,

KREINDLER LLP	SHER TREMONTE LLP
/s/ Megan Benett	/s/ Theresa Trzaskoma
Megan Benett	Theresa Trzaskoma

³ The *Ashton* Plaintiffs, respectfully, reiterate that the Rule 23(b)(1)(B) limited fund class action filed by the *Wodenshek* Plaintiffs offers best procedural mechanism for avoiding the gamesmanship attendant to the ongoing race for priority in this Court and bringing about an equitable distribution of the DAB Assets. See *In re Approximately \$3.5 Billion of Assets on Deposit at the Federal Reserve Bank of New York in the Name of Da Afghanistan Bank*, Case No. 22-cv-03228 (GBD) (currently on appeal before the Second Circuit, Case No. 22-965).

EXHIBIT A

21-2043

Christine Levinson et al. v. Kuwait Finance House (Malaysia) Berhad

In the
United States Court of Appeals
For the Second Circuit

August Term, 2021

No. 21-2043

CHRISTINE LEVINSON, INDIVIDUALLY AND AS CONSERVATOR OF THE
ESTATE AND PROPERTY OF ROBERT LEVINSON, SUSAN LEVINSON
BOOTHE, STEPHANIE LEVINSON CURRY, SARAH LEVINSON MORIARTY,
SAMANTHA LEVINSON, DANIEL LEVINSON, DAVID LEVINSON,
DOUGLAS LEVINSON,

Plaintiffs-Appellees,

v.

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD,

*Defendant-Intervenor-Appellant.**

Appeal from the United States District Court
for the Southern District of New York.
No. 21-4795

* The Clerk of Court is respectfully directed to amend the official caption as set forth above.

1 Loretta A. Preska, District Judge, Presiding.
2 (Argued March 29, 2022; Decided July 21, 2022)

3
4 Before: PARKER, PARK, and ROBINSON, *Circuit Judges*.

5
6 Appeal from an order of the United States District Court for the Southern
7 District of New York (Preska, J.) granting Appellees' motion for a writ of
8 execution against the assets of Appellant. We **VACATE** the order and
9 **REMAND** for proceedings consistent with this opinion.
10

11
12 DANIEL W. LEVY, McKool Smith P.C.,
13 New York, NY, *for Plaintiffs-Appellees*.

14
15 CHARLOTTE H. TAYLOR (Noel J.
16 Francisco, Steven T. Cottreau, Jones
17 Day, Washington, D.C.; Fahad A.
18 Habib, Jones Day, San Francisco, CA;
19 Andrew J. Pincus, Charles A.
20 Rothfeld, Mayer Brown LLP,
21 Washington, D.C.; Mark G. Hanchet,
22 Christopher J. Houpt, Cleland B.
23 Welton II, Robert W. Hamburg,
24 Mayer Brown LLP, New York, NY,
25 *on the brief*), Jones Day, Washington,
26 D.C., *for Defendant-Intervenor-*
27 *Appellant*.
28

29 BARRINGTON D. PARKER, *Circuit Judge*:

30 Under the Foreign Sovereign Immunities Act of 1976 (FSIA), foreign states
31 and their agencies and instrumentalities are immune from suit in the United
32 States, and their property is immune from attachment and execution. *See* 28 U.S.C.

§§ 1604, 1609. These immunities, however, contain exceptions. One exception allows parties to sue foreign state sponsors of terrorism for damages for claims arising out of acts of terrorism. *See* 28 U.S.C. § 1605A(a). Another exception, the Terrorism Risk Insurance Act of 2002 (TRIA), allows parties to satisfy FSIA judgments using attachment or execution against certain property—“blocked assets”—of the foreign state and of any of its “agenc[ies] or instrumentalit[ies].” *See* TRIA § 201(a).

The Levinsons hold an FSIA judgment against the Islamic Republic of Iran. Based on that judgment, the Levinsons moved for a writ of execution against the assets of Kuwait Finance House (KFH) Malaysia in the Southern District of New York. The District Court granted the writ before making any findings as to whether KFH Malaysia is an “agency or instrumentality” of Iran or whether the assets at issue are “blocked.” The primary issue in this appeal is whether TRIA permits those assets to be executed upon prior to such findings. Our answer is no.

BACKGROUND

The Levinsons are family members of Robert Levinson, a United States citizen who in early 2007 was captured by an unidentified terrorist organization. The Levinsons sued Iran under the FSIA in the United States District Court for the

1 District of Columbia, alleging that, among other things, Iranian security forces
2 arrested and for years tortured Levinson, who is now presumed dead.¹ Iran failed
3 to appear in the action, and the District Court entered a \$1.5 billion default
4 judgment.

5 Seeking to enforce their judgment, the Levinsons commenced a turnover
6 proceeding in the Southern District of New York against Citibank, N.A., under
7 New York CPLR Sections 5225 and 5227². The sealed complaint alleged that KFH
8 Malaysia—a foreign retail and commercial bank—is an “agency or
9 instrumentality” of Iran whose assets, including those located in its New York
10 Citibank account, are subject to forfeiture under TRIA. The complaint also alleged
11 that KFH Malaysia and related entities “are acting as agen[cies] or
12 instrumentalities, on behalf, and at the direction, of” the National Iranian Oil
13 Company (NIOC).

¹ The Federal Bureau of Investigation (FBI) investigated the disappearance and “concluded that Iran had attempted to create a false narrative that Robert Levinson was being held captive by an unnamed terrorist organization as part of an effort by Iran to avoid responsibility for Robert Levinson’s being taken hostage and his torture.” Joint App’x at 5.

² The statutes are entitled “Payment or delivery of property of judgment debtor” and “Payment of debts owed to judgment debtor,” respectively.

1 About the same time the Levinsons filed the sealed complaint, they also
2 moved *ex parte* for a writ of execution against the assets contained in KFH
3 Malaysia's Citibank account. The motion contended that those assets were funds
4 held on behalf of an identified shell company used by NIOC. In support of their

allegations, the Levinsons submitted the [REDACTED]

[REDACTED].³ [REDACTED]

[REDACTED]

[REDACTED]

9 [REDACTED]. The

10 Levinsons also provided a declaration from a banking expert with experience in
[REDACTED] matters relating to sanctions and terrorist financing who [REDACTED]

12 [REDACTED].

13 On June 14, 2021, the District Court granted the motion for a writ of
14 execution, directing the U.S. Marshal to "levy and collect" the assets held in KFH
15 Malaysia's Citibank account in the sum of \$1.457 billion. The next day, the U.S.
16 Marshals Service served the writ on Citibank. Three days later, Citibank informed
17 KFH Malaysia that it had frozen the Citibank account. As a result, to this day, KFH

³ The Levinsons have, [REDACTED] to the District Court.

1 Malaysia has no control over the funds in that account and alleges that it must turn
2 away customers who seek to make transactions in United States Dollars. Citibank
3 continues to hold these assets.

4 The next month, KFH Malaysia submitted an emergency order to show
5 cause, seeking to intervene as of right, to vacate the writ of execution, and to file
6 counterclaims against the Levinsons. Among other things, KFH Malaysia
7 submitted a declaration, supported by documents and account records, that
8 undermined the veracity of the Levinsons' allegations, [REDACTED]

9 [REDACTED].

10 On July 27, 2021, the District Court heard argument on these motions. There,
11 the Levinsons contended that even without the disputed transactions, they had
12 provided sufficient evidence for the court to conclude that KFH Malaysia was an
13 "agency or instrumentality" of Iran. [REDACTED]

14 [REDACTED], setting out the
15 relationship between the Appellant, its related entities, and Iran. In response, KFH
16 Malaysia disputed that relationship, and contended that the Levinsons were not
17 entitled to the writ because, among other reasons, the Levinsons "don't have a
18 finding, a judicial ruling that [Appellant] is an agency or instrumentality."

I

As an initial matter, the Levinsons have moved to dismiss this appeal for lack of appellate jurisdiction. We deny that motion.⁵

The courts of appeals have “jurisdiction of appeals from all final decisions of the district courts of the United States.” 28 U.S.C. § 1291. Whether a district court’s order is appealable under Section 1291 “ordinarily ‘depends on the existence of a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). Finality requires “‘that there be some manifestation’ by the district court that it intends the decision to be its ‘final act in the case.’” *Nelson v. Unum Life Ins. Co. of Am.*, 468 F.3d 117, 119 (2d Cir. 2006) (quoting *Paliaga v. Luckenbach S.S. Co.*, 301 F.2d 403, 407 (2d Cir. 1962)).

The Levinsons contend that we lack jurisdiction to hear this appeal because the District Court’s June 14th order granting the writ of execution is not “final” within the meaning of 28 U.S.C. § 1291. They argue principally that the District

⁵ KFH Malaysia has filed a petition for a writ of mandamus in the event that we hold that we lack jurisdiction on direct appeal. *See In re: Kuwait Finance House*, Docket No. 21-2412. Because we do not so hold, we deny that petition.

1 Court did not manifest an intent that its order be final, as evidenced by its
2 subsequent ruling that the parties would conduct discovery to resolve the factual
3 question whether Appellant is as an “agency or instrumentality.” We disagree.

4 The District Court’s order granting the writ “commands” the U.S. Marshal
5 of the Southern District of New York to “levy and collect” Appellant’s funds from
6 its Citibank account. Such a command is typically what happens at the end of a
7 lawsuit. If the parties litigate a case involving damages to conclusion, the
8 prevailing party obtains a judgment authorizing law enforcement to seize assets
9 from the losing party and turn them over to the prevailing party. *See* Fed. R. Civ.
10 P. 69 (“A money judgment is enforced by a writ of execution,”); *accord Smith*
11 *v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 269 (2d Cir. 2003). That is what occurred
12 here—except there was no verdict, no findings, and no judgment against the party
13 whose assets were seized by the government. Under these circumstances, a court’s
14 later observations about a need for discovery do not establish a lack of finality.

15 This conclusion finds support in caselaw from this Circuit and others. In
16 *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009), the
17 Republic of Argentina appealed from a district court’s order of execution over
18 certain of its funds under FSIA. We held that we had jurisdiction. *See id.* at 123-24.

1 Likewise, in *Hewlett-Packard Company v. Quanta Storage, Inc.*, 961 F.3d 731, 741–42
2 (5th Cir. 2020), the court held that “orders . . . requiring defendants to transfer
3 property to plaintiffs . . . dispose of claims to that property. And these types of
4 orders have long been treated as final and appealable.” *See also* 15A FED. PRAC. &
5 PROC. JURIS. § 3910 (“Appeals continue to be permitted from orders that direct
6 immediate execution of judgment or delivery of property to an opposing party . .
7 . .”). We see no reason to depart from these holdings. Accordingly, we conclude
8 that we have jurisdiction.

9 II

10 We next turn to the District Court’s order granting the writ of execution.
11 KFH Malaysia contends that the Levinsons failed to meet their burden to establish
12 their entitlement to the writ and the District Court therefore committed legal error
13 in granting it. We agree.

14 A

15 The FSIA provides that foreign states, as well as their agencies and
16 instrumentalities, enjoy absolute immunity from suit and from the attachment and
17 execution of their assets, and these immunities fall away only under “certain
18 express exceptions.” *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018). One

1 such exception allows parties to bring suits against foreign states based on acts of
2 terrorism. 28 U.S.C. § 1605A(a). Another such exception, TRIA, allows FSIA
3 judgment holders to enforce their judgments using attachment or execution, and
4 provides that:

5 Notwithstanding any other provision of law . . . in every case in which a
6 person has obtained a judgment against a terrorist party on a claim based
7 upon an act of terrorism . . . the blocked assets of that terrorist party
8 (including the blocked assets of any agency or instrumentality of that
9 terrorist party) shall be subject to execution or attachment in aid of execution
10 in order to satisfy such judgment to the extent of any compensatory
11 damages for which such terrorist party has been adjudged liable.

12
13 TRIA § 201(a), Pub. L. No. 107-297, 116 Stat. 2337, codified at 28 U.S.C. § 1610 note.

14 TRIA itself, however, provides no procedures for enforcement. In seeking
15 attachment or execution, therefore, a judgment holder must follow the procedures
16 of state law and, to the extent it applies, federal law. *See* Fed. R. Civ. P. 64, 69.

17 As noted, the Levinsons obtained a default judgment against Iran under an
18 FSIA exception in the District of Columbia. Next, they sought to enforce that
19 judgment in the Southern District of New York under TRIA by executing on the
20 assets of KFH Malaysia. In so doing, they took two steps. First, they moved to
21 commence a turnover proceeding pursuant to CPLR § 5225(b). That section

1 provides for the enforcement of money judgments through property not in the
2 hands of the judgment debtor:

3 Upon a special proceeding commenced by the judgment creditor, against a
4 person in possession or custody of money or other personal property in
5 which the judgment debtor has an interest, or against a person who is a
6 transferee of money or other personal property from the judgment debtor,
7 where it is shown that the judgment debtor is entitled to the possession of
8 such property or that the judgment creditor's rights to the property are
9 superior to those of the transferee, the court shall require such person to pay
10 the money, or so much of it as is sufficient to satisfy the judgment, to the
11 judgment creditor and, if the amount to be so paid is insufficient to satisfy
12 the judgment, to deliver any other personal property, or so much of it as is
13 of sufficient value to satisfy the judgment, to a designated sheriff. Costs of
14 the proceeding shall not be awarded against a person who did not dispute
15 the judgment debtor's interest or right to possession. Notice of the
16 proceeding shall also be served upon the judgment debtor in the same
17 manner as a summons or by registered or certified mail, return receipt
18 requested. The court may permit the judgment debtor to intervene in the
19 proceeding. The court may permit any adverse claimant to intervene in the
20 proceeding and may determine his rights in accordance with section 5239.

21
22 *Id.* Second, the Levinsons moved *ex parte* for a writ of execution. Prior to the
23 conclusion of the turnover proceeding, the District Court granted that motion—
24 before KFH Malaysia had received any notice, and without making any findings
25 about KFH Malaysia's connections to Iran.

26 That was legal error. To be entitled to attachment or execution under TRIA,
27 a plaintiff must first establish defendant's status as an agency or instrumentality.

28 *See, e.g., In re 650 Fifth Ave. & Related Props.*, 2021 WL 1963803, at *6 (S.D.N.Y. May

17, 2021); *Weininger v. Castro*, 462 F. Supp. 2d 457, 499 (S.D.N.Y. 2006). Put another way, before ordering assets to be seized under TRIA, a district court must make findings as to whether TRIA indeed permits those assets to be seized. *See Levin v. Bank of N.Y.*, No. 09-CV-5900, 2011 WL 812032, at *13 (S.D.N.Y. Mar. 4, 2011) (“In order to determine whether a turnover order can be issued . . . the Court must first determine whether these assets are subject to attachment.”). And those findings must be made, as we have noted, in compliance with state law enforcement procedures.

Here, these procedures were not followed. Article 52 permits parties to commence turnover proceedings to enforce money judgments. *See* CPLR § 5225(b). Below, that turnover proceeding commenced, but the District Court granted the relief sought in that proceeding—a writ of execution—before it considered the antecedent issue of whether KFH Malaysia is an agency or instrumentality of Iran or whether the assets at issue are “blocked.” Without such findings, there has been no showing that KFH Malaysia is in possession of property “in which the judgment debtor [Iran] has an interest.” *Id.* Accordingly, the Levinsons failed to meet the statutory requirements under CPLR § 5225(b) and, consequently, they failed to establish that they were entitled to a writ of execution. *See Mohammad*

1 *Ladjevardian, Liana Corp. v. Republic of Argentina*, 663 F. App'x 77, 78 (2d Cir. 2016)
 2 (noting that “the district court correctly denied appellants’ motion for a writ of
 3 execution and turnover order because the Republic does not have an interest in
 4 the . . . funds”).

5 In the District Court, the Levinsons argued that they were moving for the
 6 writ of execution to prevent the “dissipation of the . . . [a]ssets.” Joint App'x at 39.
 7 In other words, the Levinsons contend that their objective was to ensure that KFH
 8 Malaysia could not withdraw the funds in question before they could be seized.
 9 On appeal, KFH Malaysia contends that the Levinsons could have achieved the
 10 same result by moving for attachment under CPLR Article 62, rather than for a
 11 writ execution. The Levinsons, on the other hand, contend that the “[e]nforcement
 12 of money judgments is simply *not* governed by CPLR Article 62.”⁶ Appellees’ Br.
 13 at 39.

⁶ We note that the TRIA on its face applies only to “blocked assets”—which the statute defines as “asset[s] seized or frozen by the United States under” one of two statutes. TRIA § 201(d)(2)(A). Under that definition, therefore, “blocked assets” are presumably those which a defendant has no power to dissipate. However, based on the Supreme Court’s reasoning in *Bank Markazi v. Peterson*, 578 U.S. 212 (2016), we held in *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016), that—regardless of whether it has been frozen or seized—any property belonging to the Government of Iran (as well as its agencies or instrumentalities) under the relevant executive orders is “blocked” within the meaning of TRIA, *see id.* at 137-41.

1 TRIA states that blocked assets “*shall* be subject to execution or *attachment* in
2 aid of execution.” § 201(a) (emphasis added). The Levinsons were therefore,
3 consistent with state law, entitled to pursue pre-execution attachment procedures
4 if they chose to do so. Under New York law, which governs attachment
5 proceedings here, *see* Fed. R. Civ. P. 64, “an order of attachment may be granted in
6 any action . . . when . . . the cause of action is based on a judgment, decree or order
7 of a court of the United States.” CPLR § 6201(5). Of course, the Levinsons possessed
8 just such an order—a money judgment against Iran. Accordingly, state law
9 permitted them to pursue attachment procedures to, as the Levinsons have put it,
10 “prevent the dissipation of” KFH Malaysia’s assets. Joint App’x at 39. Thus,
11 attachment is a possible remedy, among other interim remedies, available to the
12 Levinsons, provided that they meet the applicable requirements.⁷

13 CONCLUSION

14 For these reasons, we deny the Levinsons’ motion to dismiss the appeal,
15 deny KFH Malaysia’s petition for a writ of mandamus, vacate the order granting

⁷ Based on the record before us, we express no opinion as to whether the Levinsons are entitled to an order of attachment.

1 the writ of execution, and remand to the District Court for proceedings consistent
2 with this opinion.

EXHIBIT B

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In re Approximately \$3.5 Billion
4 of Assets on Deposit at the Federal 22 Civ. 3228 (GBD) (SN)
5 Reserve Bank of New York in the
6 Name of Da Afghanistan Bank

Conference

New York, N.Y.
April 26, 2022
11:00 a.m.

7
8 Before:

9 HON. GEORGE B. DANIELS,

District Judge

10 -and-

11 HON. SARAH NETBURN,

U.S. Magistrate Judge

12
13
14
15
16 APPEARANCES

17
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(Case called)

JUDGE DANIELS: All right.

Ladies and gentlemen, first, the purpose of this proceeding is so that everyone can get a clear understanding, from your perspective and from our perspective, of how we're proceeding with regard to these funds. My intent is to resolve whatever issues need to be resolved in the current turnover proceedings. Anyone who believes they have any interest, who are a part of the MDL or not part of the MDL, in these funds, if they're not already here in this proceeding, should seek to intervene, because this is where we're going to decide this issue.

I've spoken with Judge Caproni. We are in agreement that we will be moving forward, and it is not likely that any other proceeding will interfere or address the issues that we intend to address in the turnover proceedings prior to our moving forward.

We have a schedule. The most recent letters asked about adjusting the schedule. I'll let Judge Netburn address those issues, but I want to make something really clear. There is no other proceeding that anyone in this room can initiate that will be appropriate to address the issues that we're going to address in the turnover proceeding.

I'll be more direct about this. The filing that was made before Judge Caproni of a separate complaint by plaintiffs

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1 who are already plaintiffs within another case in which they're
2 seeking to obtain funds in support of judgments here is wholly
3 inappropriate. We can address that further, but I do not
4 intend to spend any more of the Court's time or the lawyers'
5 time addressing those issues. As far as I'm concerned, that
6 case will not interfere.

7 I will give the lawyers in that case an opportunity to
8 consider immediately whether they wish to, within the next 24
9 hours, move to dismiss that case without prejudice. If that is
10 not done, if that's not a decision that is made by the lawyers
11 in that case, then I will act independently on that case and
12 dismiss that case on its merits. I'll give you 24 hours to
13 decide what to do. It is inappropriate to file a duplicative
14 case that seeks to enforce the same rights based on the same
15 set of facts and to enforce a judgment in a litigation in which
16 the parties have been engaged for years. It is clearly not
17 appropriate for a class action, a putative class action.

18 The fact is that's one of the reasons why we're all
19 here in an MDL, because presumptively, this is not appropriate
20 for a class action. These are individual claims, and I do not
21 intend to prejudice any party. In the turnover proceeding, we
22 intend to resolve certain specific issues. And I can tell
23 you -- I have my notes here -- one, we're going to first
24 resolve whether or not these subject funds are available to
25 satisfy judgments against the Taliban. That's the first

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1 question to be resolved.

2 Second, which plaintiffs may recover and obtain money
3 from those funds if those funds are, in fact, legally available
4 to satisfy judgments?

5 And then discuss and determine what is an equitable
6 distribution of those funds given the number of plaintiffs that
7 are outstanding.

8 I can tell you right now my inclination is not that an
9 equitable distribution is first come first served. My
10 understanding is it will be resolved one of three ways. If the
11 plaintiffs cannot agree, this Court will independently
12 determine whether these funds are available and what is the
13 appropriate distribution of those funds.

14 If there is a suggestion by the parties, that the
15 parties agree upon -- and my understanding is that pretty much
16 everyone has agreed to some form of distribution, other than
17 the Ashton plaintiffs -- and again, my reaction to the filing
18 of a separate case before another judge to try to obtain those
19 funds is inappropriate not only because there's a case already
20 pending here -- and that's filed to be related to a case that
21 isn't even part of the MDL and isn't even a 9/11 case -- but
22 also, as a class, the relief that the parties sought in that
23 case advantages no one but themselves. So to say that there is
24 somehow a reasonable representative plaintiff for all the other
25 plaintiffs, quite frankly, from what I've read, I don't know

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1 any other plaintiff in this room who agrees with it.

2 This was what I consider to be a totally inappropriate
3 attempt to simply advantage one set of plaintiffs. There's no
4 legal basis to do so. There's no legal basis to file a
5 separate complaint, given there's already litigation here, and
6 there's no legal basis to attempt to make that into a class
7 action to represent a class of plaintiffs. We have
8 approximately 10,000 plaintiffs here, and I see no advantage to
9 any of the particularly 9,000 of these plaintiffs who already
10 have judgments or are in the process of obtaining judgments.

11 Now, I've spoken with Judge Caproni. We all know what
12 the status is of the case that's before her.

13 One, it is not a 9/11 case.

14 Two, the plaintiffs don't have a judgment.

15 Three, the plaintiffs haven't even served in that
16 case.

17 So that case is not likely to advance in any way that
18 would interfere with the schedule that we anticipate in
19 efficiently and effectively moving forward with to resolve the
20 turnover proceeding.

21 Judge Caproni and I have been in contact, and we're
22 going to keep in contact with an understanding that if some
23 action needs to be taken in that case that might influence
24 what's going on here, we will discuss it before it happens.
25 But it is not likely that even in a general scenario -- there's

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1 no need for any further orders to prevent that from happening.
2 That case not only is not ripe for this determination of the
3 issues that the second case was attempting to join, there are
4 even questions about whether or not that in and of itself is a
5 viable case.

6 So everybody should understand that we will be
7 proceeding as we intended to proceed. We will decide those
8 issues in this litigation. I do not anticipate that it will be
9 decided anywhere else, and I am going to indicate right now
10 that no further filings of new complaints in any other court
11 that address the claims raised in this case and before this
12 Court are to be filed without leave of this Court. All right?

13 I want to make that clear to everybody. Most of the
14 concerns that the parties have raised in their letters and in
15 their actions are concerns that both Magistrate Judge Netburn
16 and I have already discussed, have already factored in, have
17 already considered, and we intend to move forward in order to
18 make a determination as to if and how these funds are to be
19 distributed.

20 As I say, my intent is to concentrate, to the extent
21 possible, on what would be an equitable distribution of those
22 funds if those funds are available. It is not, as I say, first
23 come first served. If the parties have a suggestion, which is
24 unanimous or which is the majority of the parties, the vast
25 majority, we are willing to consider that.

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1 I don't want to go too far ahead of myself, but I'm
2 even willing to consider, if it's appropriate, appointing a
3 special master to help the parties agree on a proposal that we
4 can consider and determine whether or not it's a reasonable
5 distribution of those funds if those funds are legally
6 appropriate to disburse to the plaintiffs in this case.

7 So I want to make it real clear there should be no
8 more strategic filings in order to advantage any particular
9 plaintiff. Quite frankly, if I have to make an equitable
10 determination about who gets what, one of the things I may end
11 up factoring in is which parties have been obstructionist with
12 regard to the process and whether or not they should be treated
13 on the same footing with the other plaintiffs.

14 Let me be blunt about it. The lawyers here are not
15 crabs in a barrel. All right? You're all plaintiffs with the
16 same type of claim and similar interests, but the determination
17 of who is to recover, how much is to be recovered, and where
18 that recovery should come from are individual decisions, for
19 the most part, that have to be made. And we are in the
20 process. We would be probably a good 25 hours ahead of where
21 we are today if we didn't have to deal with this kind of issue
22 in this case and we could continue to concentrate on moving
23 along with the determination of damage awards and final
24 judgments for the parties.

25 That's my initial statement.

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1 If someone wants to be heard, if you have any
2 questions about that, let me hear it now, because this isn't
3 rocket science that we're dealing with. We're moving forward
4 efficiently, and to the extent that you have a concern that
5 your interests are not being adequately considered, you can let
6 me know.

7 Yes, Ms. Benett.

8 MS. BENETT: Megan Benett on behalf of the Ashton
9 plaintiffs and the Wodenshek plaintiffs.

10 First, I'd like to thank the Court for having us
11 appear in person for this conference and for stating your
12 concerns as to equitable treatment and not sort of having this
13 as a first-come-first-served process.

14 I do want to be clear we are the people who filed the
15 class complaint. I understand the Court's frustration. I hear
16 what the Court is saying about that. I want to clarify a
17 couple of points.

18 First of all, the Ashton plaintiffs are not a small
19 minority. We represent 800-some families, 25 percent of the
20 victims killed in the 9/11 attacks. The reason that you see
21 that we haven't joined into what has been described as the
22 framework agreement is that because it is our understanding
23 that that framework agreement would put the families of the
24 Havlish plaintiffs in a position of receiving somewhere north
25 of 80 percent of their judgments, the value of their judgments;

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1 the insurance companies receiving less than 20 percent of the
2 value of their judgments; and the rest of the 2,900-some
3 families receiving something on the order of 1 or maybe 2
4 percent of the value of their judgments.

5 JUDGE DANIELS: Well, since it has not been laid out
6 for me or Judge Netburn exactly what that agreement entails, I
7 have not factored any of that in a determination at this point
8 as to whether these funds are available for recovery and how
9 these funds should be distributed.

10 MS. BENETT: I understand, and that obviously, both in
11 this case and the Owens case, is the major threshold question.
12 And when we had the initial conference in February, I think we
13 had expected that the order, the decision-making would take
14 those dispositive threshold questions first and then the
15 thornier distribution questions as sort of a second-order
16 problem. It appeared to us, based on the schedule in the
17 turnover proceedings, that there was going to be a
18 determination regarding distribution perhaps simultaneous with
19 the question of whether those assets would be available at all.

20 To be clear, the 23(b)(1)(B) complaint would not
21 advantage the Ashton plaintiffs over anybody else. In fact,
22 the class definition was defined specifically in a way to
23 include everybody who has a claim against those assets and
24 would allow for transparent -- because to the Court's comment
25 about the terms of this framework agreement, we haven't been

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1 presented with a formal term sheet at all either. So my
2 description to the Court is driven, in part, by the fact that
3 this is somewhat opaque and that the 23(b)(1)(B) class
4 complaint seemed to us the most transparent, equitable and
5 judicially overseen vehicle to consider the distribution,
6 should the Court get to the distribution stage.

7 It also, and I understand that the Court -- I
8 understand the hostility to the vehicle, but it did, to our
9 mind, also provide the Court with a way to take jurisdiction
10 over the entirety of those \$3.5 billion in assets. And I hear
11 the Court's representation regarding the Owens case. The fact
12 is that the April 11 decision from Judge Caproni granted an
13 order of attachment and stated that the Owens plaintiffs would
14 have priority.

15 It may well be that that is not ultimately the case,
16 but given that posture, I think we were not unreasonable to be
17 concerned that there was an ongoing race to the bank. The
18 23(b)(1)(B) complaint is not unusual as a sort of settlement
19 vehicle. It is specifically designed when there is a limited
20 fund. It is not a question about determination of liability on
21 an individual basis, but it's basically an equitable vehicle
22 that is similar to a bankruptcy proceeding or reverse
23 interpleader. And so the point about filing was simply to
24 provide a vehicle that would treat all of the victims of
25 Taliban-sponsored terrorism in the fairest, most equitable and

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1 most transparent basis.

2 It was not meant to advantage one family. It was not
3 meant to advantage one law firm. To the contrary; we have
4 consistently, throughout this process, been voicing our
5 concerns about any distribution proceeding that would treat one
6 family who suffered similar, if not identical, losses
7 differently from another family who suffered those same losses.

8 I believe that everybody, all of the 9/11 families
9 feel that way. I know that in statements to the press, that
10 the lawyers for the Havlish group and Ms. Havlish herself
11 stated that they care about fair treatment here. The
12 23(b)(1)(B) limited class fund, to our mind, given the
13 competing claims in the Owens case -- and to be clear, the
14 Owens plaintiffs would also be able to participate in a limited
15 class fund. This was not meant to exclude the non-9/11
16 community. It was meant to be as welcoming as possible to
17 everybody who can establish that they have liability claims
18 against the Taliban and that they've suffered injuries
19 proximately caused by the Taliban's support of mass terrorist
20 attacks.

21 I don't know if the Court wants to hear anything more
22 about that.

23 JUDGE DANIELS: No, I don't, because I understand your
24 position and I understand what you attempted to do, but I think
25 it's totally inappropriate in this case.

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1 I'll just give you one example. There's absolutely no
2 reason why that complaint should have been filed before Judge
3 Caproni rather than filed here, and I don't know that there's
4 any party here who is going to say that your filing that,
5 particularly as a class action, somehow advantaged them. It
6 was an attempt to advantage you and disadvantage everyone else.
7 As I say, unless the parties want to spend some more time
8 briefing it and litigating it, I have determined that it is
9 inappropriate and it is appropriate for dismissal. It does not
10 add anything to this litigation, and it does not address any
11 issues that are not being addressed in this litigation. That
12 should settle the issue.

13 I will give you 24 hours to decide whether or not you
14 want to move to dismiss this case, without prejudice, and if
15 you make such an application within the next 24 hours, I will
16 grant that application. If you do not make such an
17 application, I will move forward to dismiss the case on its
18 merits, because it has no utility. It has absolutely no
19 utility.

20 Now, if it was motivated out of fear, I understand
21 that; that's what you're basically saying to me. But I can
22 assure you that the process we have in place, the
23 communications that are almost daily at this point that
24 Magistrate Judge Netburn and I have on this issue and the
25 communications that I am now having directly with Judge

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1 Caproni, having the same conversations we're having here about
2 what's going on over there and what's going on over here and
3 whether or not cases belong over here and whether or not
4 anybody can pick and choose and judge shop where they want to
5 file their next claim, that clearly is to be resolved in this
6 MDL litigation.

7 So the fact is you should let me know whether you want
8 to step aside and focus on the turnover proceeding. If the
9 Owens plaintiffs want to come in and they think they've got an
10 interest and they want to participate in the turnover
11 proceeding, they can. But we intend to move forward and
12 resolve this issues expeditiously, step by step, giving
13 everyone an opportunity to be heard. There's no reason to
14 believe that there's any concern that these issues are going to
15 be resolved somewhere else before they're resolved here.

16 You made your calculation that this was the way that
17 you wanted to proceed, by filing a separate lawsuit related to
18 Owens. But I want to make clear to you and to everybody else
19 who might want to consider doing the same thing, it's not going
20 to happen. What you will do is not put yourself at the front
21 of the line; you will end up putting yourself at the back of
22 the line by taking those kind of actions.

23 You know we have a forum to resolve these issues.
24 That is the only forum that exists to resolve these issues
25 currently. If that changes, then we can address it. But I

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1 don't anticipate it's going to change, and I don't anticipate
2 that Judge Caproni is going to take any action in that infant
3 case to interfere with a determination that all of you are
4 going to have an opportunity to participate in and will be
5 resolved here and resolved with the availability and the
6 distribution of those funds, if those funds are available to
7 distribute to the parties.

8 I don't want to spend a whole lot more time on this,
9 unless you want to spend a lot more of your time on this.

10 MS. BENETT: No. I just want to correct a couple of
11 things.

12 First of all, to be clear, the class complaint -- and
13 I hear the Court on that, but I want to make clear it would not
14 have advantaged the Ashton plaintiffs. We would not have been
15 driving the process the way the Havlish attorneys suggested in
16 their filing yesterday. It would have been a judicially
17 overseen process.

18 JUDGE DANIELS: Well, who would it have advantaged
19 then?

20 MS. BENETT: All of the families who are victims.

21 JUDGE DANIELS: Why? They're perfectly satisfied to
22 have this issue resolved in a turnover proceeding.

23 MS. BENETT: No, no. That's not true. It's not all
24 of the 9/11 families who are perfectly happy to have it
25 satisfied in the turnover proceeding, and it's and it's not all

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1 of the victims of Taliban-sponsored terrorism.

2 JUDGE DANIELS: Who else are you referring to other
3 than yourself?

4 MS. BENETT: All of the embassy bombing victims, and
5 to be clear --

6 JUDGE DANIELS: Who else are you referring to, other
7 than your client?

8 MS. BENETT: The 25 percent of the 9/11 families that
9 we represent.

10 JUDGE DANIELS: I'm sorry. I have not received any
11 communication from any other lawyers saying that they are in
12 agreement with what you did.

13 MS. BENETT: They aren't. They made a different,
14 tactical decision. They wanted to enter into an agreement to
15 hedge their bets and guarantee some modest economic recovery
16 for their clients at a grossly disproportionate value vis-à-vis
17 the insurance companies and the families of a smaller number of
18 victims. That was a different decision.

19 We made a decision to file this because we thought it
20 wasn't right to disadvantage 2,900 --

21 JUDGE DANIELS: It should have been filed here.
22 That's my first point. It should have been filed here. You
23 don't get to file it in Wyoming.

24 MS. BENETT: I hear you.

25 JUDGE DANIELS: We're in the middle of an MDL that's

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1 been going on for years and involves thousands, as you say, of
2 plaintiffs who have a similar interest in these funds. That is
3 not the appropriate way to proceed. It's not even the
4 efficient way to proceed. It's the inefficient way to proceed,
5 given the fact we are engaged in turnover proceedings.

6 MS. BENETT: I hear you on that point, and I know the
7 Court recognizes this, but I do want to just state on the
8 record we filed with -- in connection with marking it related
9 to Owens for one reason, which is that that was the only case
10 that had a judicial restraint on the funds. It's an *in rem*
11 proceeding against \$3.5 billion. We sent a copy. As the Court
12 knows, we sent a copy of our filings. We filed them the same
13 time in the MDL, and I recognize that this was not how the
14 Court would have --

15 JUDGE DANIELS: Well, look --

16 MS. BENETT: But we did not try to hide it. We
17 provided and we trusted --

18 JUDGE DANIELS: If you don't want to participate here
19 and you want to go sit over there, maybe I'll consider that.
20 But you know that's not what you want to do.

21 MS. BENETT: We want all of the claims to the \$3.5
22 billion to be consolidated in front of a single court.

23 JUDGE DANIELS: And that's this Court.

24 MS. BENETT: And that's fine.

25 JUDGE DANIELS: There's no reason to believe that

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1 that's supposed to be Judge Caproni.

2 MS. BENETT: But we only believed that because Judge
3 Caproni had issued the April 11 order restraining the assets
4 and because in connection with the previous effort to have the
5 Owens case brought into the MDL, both courts rejected that. So
6 we gave both courts the complaint. Certainly, in retrospect, I
7 wish that we had marked it as related to both. I'm not sure if
8 that's even an option on the form, now that I'm thinking about
9 it.

10 JUDGE DANIELS: No, it's not. It would have been an
11 inappropriate option.

12 MS. BENETT: We gave both courts, we intended to give
13 both courts notice and trust the courts to decide which venue
14 was proper. But the point was always that the 3.5 billion
15 should be adjudicated by a single court, including all those
16 threshold questions that are going to be dispositive of whether
17 this money is available to satisfy any judgments in the first
18 place.

19 So the filing of the class complaint was meant to, A,
20 have all the adjudications regarding those assets from a single
21 court; and two, as I said, and I -- you know, I hear the
22 Court's response to this. But it was truly because we were
23 concerned about a process that was going to so grossly
24 disproportionately treat 9/11 family members in a way that
25 our -- and I speak to our clients all the time. I know the

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1 same is true even for clients represented by firms that reached
2 a different decision, that the distribution as proposed in the,
3 initially in the turnover proceedings was so deeply troubling
4 to our family members that we did not believe that we could
5 participate in the framework agreement that would have put, you
6 know, treated one person's life as worth 2 percent of the
7 others'.

8 JUDGE DANIELS: As I usually say, that was a hallway
9 debate that you had with the others. That was not an issue
10 that this Court raised. That is not an issue that this Court
11 adopted. This Court isn't even aware of what the agreement is.
12 The appropriate place to resolve those issues and understand
13 how we were ultimately going to proceed is in this forum, in
14 this courtroom.

15 MS. BENETT: And I think that that's -- and to the
16 extent that we can do so with judicial oversight and in a
17 transparent manner, that will provide real comfort to the
18 family members. Before the Court's order on Thursday, we had
19 intended to file something noting that we were -- you know,
20 given that the framework agreement had been discussed in papers
21 but without terms, we did intend, before our attention turned
22 to the hearing this morning, to ask the Court to perhaps
23 explore what the terms of that framework agreement looked like,
24 because like I said, our position has been all along that every
25 single family member, all 2,977 families, should be treated

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1 fairly and equitably; that the agreement, as we understood it,
2 would not only fail to do so but would fail to do so in a very
3 dramatic fashion; that the 23(b)(1)(B) class complaint was a
4 vehicle that could take into consideration certain concerns
5 that parties have raised previously of those who have not
6 participated in the USVSST fund, which has made, to be clear,
7 very modest payments to some of the 9/11 family members, that
8 their decision not to participate in that fund could be taken
9 into consideration when fashioning any distribution should the
10 assets be available through the class complaint -- through the
11 limited class fund, rather.

12 JUDGE DANIELS: And you all have the opportunity to
13 raise those issues before this Court.

14 JUDGE NETBURN: Right. I think the thing that's most
15 frustrating here is you could say a lot about this MDL, but you
16 could not say that we haven't given everybody an opportunity to
17 be heard. We allow everybody to speak up. We want every
18 family to participate, and filing this class action before
19 Judge Caproni feels like an end run around that process. And
20 that feels inappropriate. I understand that you represent a
21 quarter of the families, but the vehicle that you chose to do
22 this feels completely like you're trying to slot out everybody
23 else when you have never been denied an opportunity to be
24 heard.

25 I think there's lots of questions about your class

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1 complaint, as evidenced by this conference, as to whether or
2 not you would be adequate counsel, given the opposition so many
3 people have; whether or not your claims are typical; whether or
4 not you can prove that class is a superior method over the MDL.
5 All of those things are very serious questions in my mind and
6 point to a not-well-thought-out choice. And as a result, we
7 have all spent, as Judge Daniels said, dozens and dozens of
8 hours focusing on this charade instead of focusing on the real
9 issue.

10 So if you want to be heard on what you think is an
11 appropriate distribution, should the Court determine that those
12 funds are available, you will have that opportunity to be
13 heard. But going about it this way leaves a very off taste in
14 our mouths, and it doesn't feel like it's being done in the
15 interest of the class. It feels like it's being done in the
16 interest of your clients because your clients feel like they're
17 not going to get what you think is appropriate. And I'd like
18 to hear about this, but not through this vehicle.

19 MS. BENETT: Understood.

20 Just to be clear, Judge, at the February 22
21 conference, there was the *sua sponte* questions about how
22 anybody without a liquidated damages judgment would have
23 standing to participate in a turnover proceeding as a sort of
24 the threshold matter, and it was at that point that we became
25 concerned. And I hear what the Court is saying about the time

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1 and effort spent thinking about an equitable process here. And
2 again, it's obviously very reassuring to the family members;
3 I'm sure all of them, not just those we represent. But we did
4 have concerns that there would be -- we didn't know how it was
5 going to unfold.

6 The class complaint was -- and I, again, hear the
7 Court. I can say it was not meant to be an end run at all. To
8 the contrary, and it's not meant to be outside of the MDL. It
9 is a limited class fund that could be available for purposes of
10 resolving claims to the DAB assets within the MDL. It's not --
11 there are no sort of -- there are no liability questions. I
12 mean depending on how -- and again, the way the class was
13 crafted was meant to be as fair and reasonable as possible
14 given the nature of the claims already asserted by various
15 parties against the Taliban and against the DAB assets.

16 I don't know that it's worth answering the Court's
17 questions or addressing the Courts' complaints. I will say
18 it's certainly not meant to be a charade. It was meant to be a
19 vehicle that would -- you know, we thought that the Court might
20 welcome as a method for this distribution, given also what the
21 Court said at the February 22 conference about being sort of
22 bound by New York State priority rules and the same -- Judge
23 Caproni echoing the same at the March conference of the Owens
24 hearing.

25 And the fact is that the Rule 23(b)(1)(B) limited

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1 class fund would actually take jurisdiction over all of the
2 assets and would provide a way for the Court to not have to
3 worry about the built-in inequity of the priority rules in a
4 case like this, where you have a mass terror attack or several
5 terrorist attacks with sort of predetermined damages, judgments
6 issued against the co-joint tortfeasor, would allow the Court a
7 means by which to address this equitably without having to be
8 concerned with the New York State priority rules, which I think
9 it's fair to say certainly didn't contemplate this particular
10 situation but also don't seem to have fair application in an
11 MDL, where the use of those priority rules would sort of force
12 the Court into the position of choosing, you know, one person,
13 one identically situated person over another.

14 I don't know if it's --

15 JUDGE DANIELS: Those are tough choices, but this
16 Court is prepared to make those choices. OK? And it's not up
17 to you to make those choices, to reframe it to your advantage.
18 Those issues will have to be addressed. We will address every
19 one of those issues after giving everyone a full opportunity to
20 give their input. Neither you nor any individual lawyer in
21 this room has the ability or the right to define that for this
22 Court or for the rest of these plaintiffs.

23 All of these plaintiffs have the same interest that
24 you have in making sure that their clients get as much
25 satisfaction of their outstanding damages as you do. That's to

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1 be decided in the same room at the same time for all of the
2 plaintiffs, not to be decided in a separate courtroom, in a
3 separate litigation, while we're trying to figure out what
4 you're doing across the hall.

5 MS. BENETT: I hear you, and I know I've said this
6 already. I just want to be clear. The proposal that we put
7 forward -- first of all, this Court could oversee a limited
8 fund.

9 JUDGE DANIELS: You didn't bring it to this Court.
10 You didn't give us any indication --

11 MS. BENETT: I understand.

12 JUDGE DANIELS: -- that that was the case. You gave
13 us the opposite indication.

14 MS. BENETT: My point is that this Court, of course,
15 could take jurisdiction over that if it chose to, but I just
16 want to clarify that it would not advantage the family members
17 we represent over somebody else. To the contrary, it is
18 currently the only, the only vehicle, procedural vehicle we see
19 that would not do that.

20 JUDGE DANIELS: Thank you.

21 MS. BENETT: I'm sorry. I just wanted to clarify that
22 the proposed limited class fund would not, in fact,
23 advantage -- well, that's not -- it would advantage -- it would
24 be more advantageous to the 2,930 non-Havlish family members
25 than strict application of New York priority rules, but it

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1 would not be more advantageous to the family members we
2 represent vis-à-vis all of the other family members of those
3 killed and injured in Taliban-sponsored terrorist attacks.

4 I understand, and I've heard both of the judges
5 express your displeasure and believe that this was
6 gamesmanship. I want to be clear. We filed this in order to
7 treat every family that was a victim of a Taliban-sponsored
8 terrorist attack on an equal and fair basis, not to advantage
9 our clients, not to advantage certain family members over
10 others and not to advantage us. In fact, a limited class fund
11 would be overseen by the Court. It would not be overseen by
12 the lawyers.

13 This was not a question about class counsel fees.
14 This was about making sure there was a vehicle, given what we
15 had heard at the two prior hearings, in the Owens case and this
16 case, about the Court's feeling bound by New York State
17 priority rules and given what the contours of this framework
18 agreement, which I understand neither I nor the Court know the
19 specifics of, but I am fairly confident would not have treated
20 family members on a fair and equitable basis.

21 JUDGE NETBURN: I think Judge Daniels and I both don't
22 want to get too far along on the merits of this class
23 complaint, but to the extent what I'm hearing is that you think
24 filing a class action would obviate the need or the obligation
25 of the Court to consider New York priority rules, why do you

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1 think that? Wouldn't there still be an application of priority
2 at least within the class complaint, or you think that just
3 disappears then and there wouldn't be subclasses, for instance?

4 MS. BENETT: Do you mind if I -- my cocounsel, Ms.
5 Trzaskoma, who has more familiarity with this process, can tell
6 you why. But there could be an equitable way to treat people
7 based on, for example, what category you fall into. But I do
8 not believe that New York State priority rules would have any
9 application in the -- that basically the \$3.5 billion goes into
10 a judicially supervised equitable trust, and then it is for the
11 Court to decide without application.

12 The only reason New York State priority rules are at
13 issue here is because of Federal Rule of Civil Procedure 69,
14 which says that in the execution of judgments, the Court should
15 look to the law of the state where it's situated. Under a Rule
16 23(b)(1)(B) limited class complaint posture, however, you're
17 not looking at the execution of judgments. You're looking at
18 the people who have claims. However the Court would define the
19 class, you're looking at people who fall into that class who
20 have claims against that fund. That's why it's an *in rem*
21 proceeding.

22 I think in the letter last night, one of the parties
23 had said they don't even know who the defendants are, but
24 that's because it's an *in rem* proceeding against these assets
25 themselves, and so New York State priority rules don't come

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1 into play because you're not looking at execution of judgments.

2 JUDGE DANIELS: All right. Did you want to be heard
3 further on that?

4 I don't want to spend a lot of time debating
5 backwards. I understand your position. After we have this
6 discussion, as far as I'm concerned, as I always say, we start
7 this litigation anew. I'm not holding this against the parties
8 at this point, but I expect you to conform your conduct in the
9 future consistent with the way this MDL is established and the
10 issues that are supposed to be decided in this MDL. That
11 filing before Judge Caproni is inconsistent with that for a
12 number of reasons that we just discussed.

13 So as long as you understand and everyone else
14 understands -- this is not just for you; it's for anyone else's
15 benefit who thinks, OK, this is a way that I'm supposed to
16 change the issues that are before the Court and have them
17 decided in the way you want them decided. That is not the way
18 we're going to proceed. Due warning to everyone is that you
19 will do nothing but disadvantage your clients by this kind of
20 conduct in the future rather than advancing the possibility of
21 an equitable distribution of these funds if these funds are, in
22 fact, available.

23 Yes.

24 MS. TRZASKOMA: Yes, your Honor.

25 JUDGE NETBURN: Could you just state your appearance

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1 for the court reporter.

2 MS. TRZASKOMA: Yes. Apologies.

3 Theresa Trzaskoma from Sher Tremonte on behalf of the
4 Ashton plaintiffs and the class plaintiffs.

5 I don't want to tread on ground that Ms. Benett
6 already covered, but I do want to explain what the relief was,
7 is, that we are seeking in the 23(b)(1)(B) class.

8 This is with the reverse interpleader. It doesn't
9 advantage anyone to be the class plaintiffs. It is seeking an
10 equitable distribution of all the assets, including those that
11 are subject to the attachment order that Judge Caproni issued
12 in Owens.

13 Prior to our filing of that class action, it
14 appeared -- perhaps we were reading tea leaves, but there were
15 comments on the record in both this MDL and by Judge Caproni
16 that strict priority rules were going to apply, and that is not
17 appropriate in these circumstances.

18 A Rule 23(b)(1)(B) class action cuts through all of
19 that. It allows the Court to do equity, which is what I hear
20 the Court wants to do. It allows a single court, currently
21 this MDL Court, to take control and jurisdiction over the \$3.5
22 billion and then to determine what is an equitable distribution
23 based on whatever factors all of the individual plaintiffs'
24 lawyers want to make arguments to the Court. It is not
25 controlled by class plaintiffs. It is solely in the Court's

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1 discretion.

2 And that's the vehicle we brought to -- I realize we
3 brought it to Judge Caproni, which you've made clear was the
4 wrong court. But it was not intended to circumvent anything.
5 It was intended to provide a mechanism for, a procedural
6 mechanism for dealing with New York priority rules, which were
7 never intended to meet this extraordinary circumstance.

8 Rule 23 makes the New York priority rules irrelevant.
9 It takes us into an equitable process, where New York priority
10 rules don't even have to be considered. It preempts New York
11 priority rules.

12 So it can argue the right mechanism for this very
13 extraordinary situation.

14 JUDGE DANIELS: All right.

15 Before I turn to Magistrate Judge Netburn with regard
16 to -- I know there were some questions and requests about the
17 process and the dates of what things are due -- did anyone else
18 want to be heard before we moved into that?

19 MR. KREINDLER: Good morning, your Honor.

20 Very quickly -- jim Kreindler -- and I'm not saying
21 anything about the class action or the specifics, but I did
22 want to just make one comment, your Honor, because we have been
23 together wrestling with this case for 15 years. And even
24 before that, it's a long history, starting with the 1996
25 effective death penalty and Antiterrorism Act that was

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1 spearheaded by then Senator Biden and Senator Kennedy. And
2 from that time on, when it comes to the states who are sponsors
3 or involved with terror, whether it's Libya or Saudi Arabia or
4 Iran, speaking personally, I have one principle in mind. And
5 that is everyone -- every victim -- should be treated equally.
6 And as your Honors both know, while it took 20 years,
7 ultimately, we got \$10 million per death for 270 people from
8 Libya in the Pan Am 103 bombing. And that's been my approach,
9 and from the day or two after 9/11, it's something I've
10 expressed to the clients.

11 And your Honor is quite right when you identified the
12 fear we have that this approach, equal treatment for everyone,
13 which has been something important to me for these 25, 30
14 years, might be jeopardized by this, you know, race to file
15 first or obtain writs or judgments first. And while I know
16 it's taken a lot of time, speaking personally, I'm glad we're
17 together, because at least personally, I feel that this
18 commitment that I think we all share is a common theme, and we
19 can achieve it not just with this fund but when we reach the
20 promised land at the end of the case.

21 So I just wanted to thank your Honors for your time
22 and, at least speaking personally, I am reassured that whatever
23 misconceptions were there we've taken care of, and we're on
24 track to do something good and right.

25 So thank you.

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JUDGE DANIELS: Thank you, Mr. Kreindler.

Does anyone else want to be heard?

MR. CARTER: Your Honor, very briefly. Sean Carter from Cozen O'Connor, your Honor.

There's been a fair amount of discussion today about the framework agreement, and I just want to provide a brief perspective on that for the Court.

There are many of us who recognized that there was a pool of funds here that was unprotected and subject to potential attack from parties outside of the MDL. And at the same time, we recognized the complexity of the issues facing this Court in trying to deal with the turnover issues, including because the procedural posture of claims on behalf of the various plaintiffs, differed wildly, from people who had actual judgments, who had moved for monetary judgments years ago to people who had only recently filed claims the.

Within all of those issues, many of us sought to reach a range of compromises in that achieving a good result -- perhaps not a perfect result, but a good result -- would also have streamlined this entire process for the Court. So when there's conversations here about what equity demands, what is equitable and what's fair, I think part of the consideration for the rest of us was achieving a good result that simplified issues for the MDL Court and allowing the entire case to go forward.

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1 That's all, your Honor.

2 JUDGE DANIELS: Yes.

3 MR. BAUMEISTER: Good morning. I'll be brief also.

4 JUDGE DANIELS: Put your appearance on the record.

5 MR. BAUMEISTER: Mich Baumeister, representing the
6 Bauer plaintiffs.

7 I certainly am responding to Mr. Carter, and while he
8 talks about this was an efficient way, I can tell the Court
9 that my clients -- some of them are listening on the phone
10 today -- were told by other clients that the Havlish plaintiffs
11 would get 1.7 billion, his client would get 500 million. They
12 were the deal people that would take it, and if you didn't
13 agree to sign on, even though you didn't know what you would
14 get as a client, even though you didn't know if there would be
15 money, especially even Owens, if you didn't do it, at the end
16 of the day you would get zero.

17 Some of my clients have been threatened. I received a
18 letter threatening me, Do the deal. It wasn't about
19 efficiency. It was about lining their pockets and
20 disadvantaging the families.

21 So that's all I wanted to say.

22 JUDGE DANIELS: Well, the question of what is an
23 equitable distribution, if that question is to be answered,
24 will be answered by this Court. If all of the plaintiffs have
25 a suggestion or some of the plaintiffs have a suggestion or

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1 some third party has a suggestion for the plaintiffs, the
2 ultimate decision lies with the Court. So I urge you to agree,
3 to the extent that you can agree, on what is, if you can, a
4 joint position. If you cannot, those issues, the disputes
5 between the parties with regard to what is an appropriate
6 recovery for each plaintiff is an individual decision that has
7 to be made by this Court. All right?

8 Anyone else?

9 Yes, sir.

10 MR. SCHUTTY: Thank you, your Honor. John Schutty. I
11 represent a subset of the Ashton plaintiffs.

12 Your Honor, I want to thank you for your reassuring
13 words. I can advise you that my clients have lived in fear
14 since February 22 when the New York State priority rules were
15 emphasized at that conference, and it was a growing fear among
16 the 9/11 families that the Havlish plaintiffs at that time
17 would take the lion's share of the \$3-1/2 billion. So I want
18 to thank your Honor for clarifying that the Court's intent is
19 to make an equitable distribution.

20 As you may know, I filed a letter, a motion requesting
21 permission to contest the judgment that was entered in favor of
22 the Havlish plaintiffs because that judgment was entered in
23 2012 based on common law, and under the common law of the state
24 of New York, for example, many of those plaintiffs would not
25 recover money. Many of them would not get solatium damages.

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1 So I'd like the opportunity to address that issue with the
2 Court.

3 And in addition, I just want to tell your Honor that I
4 think the suggestion that a special master here would help to
5 get together with the plaintiffs' attorneys to ensure an
6 equitable distribution is something that should be thoroughly
7 considered. Both judges sitting on the bench today worked so
8 hard for us, and this issue seems to be a subset of what's
9 going on overall in the litigation. So I just would like you
10 to consider fairness and equity and remove some of the fear of
11 some of the family members.

12 Thank you.

13 JUDGE NETBURN: I'll just note that I've received your
14 letter application. I haven't acted on it. We will shortly.

15 Anyone else want to be heard?

16 JUDGE DANIELS: Ms. Benett.

17 MS. BENETT: Just briefly.

18 JUDGE NETBURN: Sure.

19 MS. BENETT: Sorry. One final suggestion from us.

20 I heard Judge Daniels on the 24 hours with respect to
21 our pending class complaint. I'd ask if the Court might let us
22 provide a short letter explanation of how that particular
23 vehicle could work in a proceeding like this, specifically
24 thinking of this now in light of Mr. Schutty's concerns raised
25 in his letter and in his statements, that there is

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1 JUDGE DANIELS: I have no interest in pursuing that
2 option.

3 MS. BENETT: OK. I was going to offer the opportunity
4 to explain a little bit of the procedural aspects of it.

5 JUDGE DANIELS: There's nothing that you can say that
6 would convince me that rather than proceed in this MDL under
7 this turnover order, that the alternative would be that we
8 adopt the complaint that you have filed.

9 MS. BENETT: I hear you, Judge. Thank you.

10 JUDGE NETBURN: All right. I'm going to turn down the
11 heat a little bit and talk about briefing schedules.

12 I understand that there's an issue related to the
13 various amici that have filed briefs. I'm going to set a
14 deadline of this Friday, which is April 29, for any other amici
15 who wishes to be heard to file their leave application. I
16 think at this point we have about five, and we will be generous
17 in allowing appropriate amici to be heard if they wish.

18 So April 29 will be the deadline for any potential
19 other amici, who might be listening in or here in the
20 courtroom, to file any leave application. And I know that the
21 Havlish creditors had proposed a more extensive briefing
22 schedule. The Court really wants to move on this, as I imagine
23 everybody else does. So my proposal is that any opposition
24 that the Havlish and Doe creditors wish to file or a response
25 be set at May 13.

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Any objection to that schedule?

All right. Hearing none, the deadline -- we'll issue an order today. Just to put it out on the record, the deadline for any amici who wish to file an amicus brief will be April 29, and anyone who wishes to respond to those amicus, the merits of their briefs, will be due May 13.

All right. Anything further from anyone?

JUDGE DANIELS: All right. We're working hard. We encourage your assistance and your input. It makes a big difference, particularly -- and it's interesting that by the time we read the letters that you've sent us, we've already discussed half the issues that are in your letters, so it gives me some comfort that we're approaching this in the appropriate way and we'll be able to expeditiously make some decisions about this.

Obviously, the Court is not in a position to give any plaintiff a guarantee that they will recover these funds or any funds and the extent to which they will recover. But I guarantee you that our main goal is to make sure that all plaintiffs can recover as much of the available funds as possible in an equitable way.

Now, whether or not we face other legal hurdles with regard to priority or with regard to other issues that might affect that, we will confront them and we will address them. But it is our intent, to the extent, consistent with the law as

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1 we can apply it, to make sure that all plaintiffs get some
2 degree of satisfaction. Obviously, no plaintiff in any case
3 can be made whole. Nobody can bring back a deceased relative.
4 Nobody can undo the damage that has been done, but we are
5 focused on figuring out, and we continue to focus on figuring
6 out, what actual funds might be available, what actual funds
7 could be distributed, and what is a reasonable and equitable
8 way to distribute those funds.

9 We still seek your guidance on that. We'll give
10 further consideration as we go through the turnover proceedings
11 as to whether or not we should initiate at this point a
12 process, if the parties agree they would like a special master
13 to look at those issues, but I can guarantee you that we will
14 give you a full opportunity to be heard, as we have given you a
15 full opportunity to be heard, on these issues -- the issues of
16 the availability of funds and the issue of who is entitled to
17 some of those funds and what would be the appropriate way to
18 distribute available funds, not just the funds at issue here
19 but any funds.

20 We know we're setting a framework for any other funds
21 that might be available in the future and the parties will seek
22 a distribution of those funds. So be assured that any concerns
23 that you have about certain issues, the appropriate way to
24 address them is to bring them to the attention of this Court
25 and to have the other side -- anyone who disagrees with your

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1 position -- be able to weigh in in this proceeding, in this MDL
2 proceeding. And we will fairly and, hopefully, efficiently
3 move forward and give you some assurance that although we give
4 no one any guarantees that you will be satisfied with the
5 ultimate result, we can give you assurance that you will all be
6 heard. Your positions will be considered, and we will make the
7 best decision that we can.

8 My position is always this -- that the best decisions
9 aren't made by smart people. They're made by informed people.
10 Give us the information that you think is compelling, and we
11 will factor it in. When we make mistakes, we usually say, Oh,
12 if I'd only known X. Right?

13 So keep us informed. To the extent that you genuinely
14 want to assist us, we encourage you to do so. To the extent
15 that you just want to simply advantage your own client, we are
16 deciding these cases on their merits, not on any other basis.
17 So keep that in mind.

18 I think it was important for us to meet here. If
19 there are other issues that this raises or that come up, bring
20 them to our attention right away. As I say, despite everything
21 else that we're doing, literally we're in contact almost on a
22 daily basis at this point with regard to these issues so we can
23 move forward efficiently and give you a result that maybe not
24 everyone will be total satisfied with, but hopefully a result
25 that you can understand, that is a reasoned judgment,

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1 consistent with the law, as to how you should participate in
2 distribution of funds and what the relationship is between the
3 plaintiffs.

4 My final reminder is you are all plaintiffs. Your
5 clients are all victims. OK? That's what should be driving
6 everyone here. That's what drives us as we're addressing these
7 issues. Right now, everyone before this Court is on an equal
8 footing, and everyone should consider when you make your
9 arguments whether those arguments support everyone's position
10 or whether those arguments simply support your position or
11 whether those arguments disadvantage some at the expense of
12 others, because that's the first evaluation that I'll have with
13 regard to your conduct, your applications, and your filings.

14 Remember, this is the forum that we're going to
15 resolve these issues. That's the bottom line of this
16 proceeding. We're going to resolve it here, not before Judge
17 Caproni, not before some other judge in this court, not in some
18 other duplicative proceeding that is to address the same issues
19 that we are already addressing here. Regardless of what any
20 party believes, it is a more efficient, effective and
21 advantageous way for us to proceed.

22 We've laid out the process and we're going to stick
23 with that process, and as far as I'm concerned, that process is
24 working. It will hopefully, and I'm confident it will, give us
25 the best result that we could possibly reach on behalf of the

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1 plaintiffs and victims that have the true interest in this
2 litigation.

3 Thank you very much.

4 Let's move forward, and we will proceed efficiently.
5 If there are any other issues that need to be addressed with
6 regard to any of these claims -- of liability or damages --
7 obviously, my position is they should be raised with this Court
8 on notice to all the other parties, either jointly or having an
9 opportunity to disagree.

10 Thank you all very much. And we will continue.

11 (Adjourned)
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